No. 90-1595

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MAKAH INDIAN TRIBE

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS COLUMBIA RIVER TRIBES IN OPPOSITION, TO PETITION FOR WRIT OF CERTIORARI

HOWARD G. ARNETT
Counsel of Record
MARCEAU, KARNOPP, PETERSEN, NOTEBOOM & HUBEL
1201 N.W. Wall Street
Suite 300
Bend, Oregon 97701
(503) 382-3011

Counsel for Respondent Confederated Tribes of the Warm Springs Reservation of Oregon

DOUGLAS NASH
Counsel of Record
Nez Perce Tribal Executive Committee
Office of Legal Counsel
P.O. Box 305
Lapwai, Idaho 83546
(208) 843-2253

Counsel for Respondent Nez Perce Tribe

TIM WEAVER
Counsel of Record
COCKRILL & WEAVER
P.O. Box 478
Yakima, Washington 98907
(509) 575-1500

Counsel for Respondent Confederated Tribes and Bands of the Yakima Indian Nation

CRAIG DORSAY
Counsel of Record
917 S.W. Oak, Suite 410
Portland, Oregon 97205
(503) 223-9483

Counsel for Respondent Confederated Tribes of the Umatilla Indian Reservation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Review Should be Denied Because There is no Conflict Among the Circuits Over the Issue of Whether Prejudice to Applicants for Intervention Under Fed. R. Civ. P. 24 is a Factor that Must be Considered in Every Analysis of Timeliness.

a. The law regarding the timeliness of the petition for intervention is well established.

"Timeliness" for purposes of Rule 24 "is not a word of exactitude or of precisely measurable dimensions." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1971); *See, Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977). "Rule 24 fails to define it, and the Advisory Committee Note furnishes no clarification." 558 F.2d at 263. "Since the requirement of timeliness is a flexible one, much must necessarily be left to the sound discretion of the court, and the trial judge's decision on the question will be reviewed only for an abuse of discretion." 7C Wright, Miller, Kane, *Federal Practice and Procedure*, Section 1916, p. 435 (1986). *See also*, 3B Moore's *Federal Practice*, Section 24-13, pp. 24, 151-153 (1990).

The applicable standards for the consideration of timeliness under Rule 24 were announced by this Court in *NAACP v. New York*, 413 U.S. 345 (1973).

> If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. *Timeliness is to be determined from all the circumstances.* And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. at 365-366 (footnotes omitted) (emphasis added).

This Court in *NAACP* then examined four factors to determine whether the motion to intervene was timely: (1) The length of time the petitioner knew or should have known of the pendency of the suit; (2) the promptness with which the petitioner acted once aware of the suit; (3) any unusual circumstances warranting intervention; and (4) any unusual circumstances mitigating against intervention. *See, Culbreath v. Dukakis*, 630 F.2d 15, 20 n.9 (1st Cir. 1980) (First Circuit describes the timeliness factors set out in *NAACP*).

The key to the test announced in *NAACP*, is "all circumstances." The factors this Court identified and considered in *NAACP* in determining timeliness clearly anticipate examination of the broadest range of circumstances both for and against intervention, in addition to the two specific considerations. Many factors have been identified and considered by courts in weighing the matter of timeliness under Rule 24 since this Court's decision in *NAACP*, including, for example:

– The amount of time that has elapsed since the suit was initiated or the stage to which the suit has progressed, *e.g., Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978), *cert. denied*, 413 U.S. 837 (1978).

– The amount of time during which the applicant knew that his interests were not protected in the suit, *e.g., United Airlines v. McDonald*, 432 U.S. 385, 394 (1977).

– Whether the applicant claims a right to intervene or merely seeks permission to intervene, *e.g., EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975).

– The interests of the applicant, *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

– The extent of prejudice to the applicant should intervention be denied, *Stallworth v. Monsanto Co., supra,* at 265-66.

– Whether the applicant seeks to relitigate issues already decided, *Liddell v. Caldwell*, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

– Prejudice to existing parties that would result from the intervention, *Stotts v. Memphis Fire Department*, 679 F.2d 579, 584-85 (6th Cir. 1982).

– Prejudice to existing parties resulting from the delay of the applicant in intervening, *Stallworth v. Monsanto Co., supra,* at 265.

– Disruption of the orderly processes of the court, *e.g., United States v. Allegheny-Ludlum Industries, Inc.*, 553 F.2d 451, 453 (5th Cir. 1977).

While this list is not exhaustive, it illustrates some of the most common considerations and the possible scope of factors that have a bearing upon the timeliness issue.

b. Flexibility in tests established by courts is necessary to allow consideration of "all circumstances" involved in the timeliness issue.

Some courts have approached and decided the timeliness issue without enumerating criteria to be considered. See, *United States v. Yonkers Board of Education*, 801 F.2d 593 (2d Cir. 1986); *National Wildlife Federation v. Burford*,

878 F.2d 422 (D.C. Cir. 1989). However, most courts have announced factors that they deem worthy of primary consideration in determining timeliness. In doing so, they have generally maintained the flexibility required to examine "all circumstances" relevant to the petition before them consistent with this Court's direction in *NAACP*.

Different courts have chosen specific factors which they consider "particularly probative" in resolving the timeliness issue, *see, e.g., Stotts v. Memphis Fire Department*, 679 F.2d 579, 582 (6th Cir. 1982), and it has been recognized that courts must be "guided primarily by practical considerations," *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), citing Fed. R. Civ. P. 24(a)(2) advisory committee note. In identifying those factors to be considered, neither the subject nor the number have been generally consistent. However, these decisions universally cite *NAACP* as establishing the requirement that "all circumstances" be examined.

In *Stotts v. Memphis Fire Department, supra*, the court identified the five factors which were "particularly probative" as follows: (1) The purpose for which intervention was sought; (2) the length of time preceding the application for intervention during which the applicant knew or reasonably should have known of his interest in the case; (3) prejudice to original parties; (4) the existence of unusual circumstances militating against or in favor of intervention; and (5) the point to which the suit has progressed. *Id.* at 582.

The three factors identified for consideration in *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975) were: (1) How

far the proceedings had gone when the movant sought to intervene; (2) prejudice to existing parties; and (3) the reason for the delay in intervention. *Id.* at 305.

A variation of those criteria is found in *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978) wherein the relevant circumstances were identified as: (1) The stage of the proceeding; (2) prejudice to other parties; and (3) the reason for and the length of the delay. *Id.* at 659.

In *Stallworth v. Monsanto Co., supra*, a key case in Makah's argument that the circuits are in conflict, the factors specified by the Fifth Circuit were: (1) The length of time the applicant knew or should have known of his interest in the case before the petition was filed; (2) the prejudice to existing parties; (3) the extent of the prejudice the applicant would suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. 558 F.2d at 264-66.

While the factors identified by these courts as relevant to the timeliness issue are generally different, none of them are inconsistent with this Court's direction in *NAACP*. They have all been shaped to allow the flexibility required in examining "all circumstances" involved in the issue of timeliness.

c. Prejudice to the applicant for intervention is not a mandatory part of the timeliness test in any circuit.

As noted above and in Makah's argument, some of the courts have included the factor of prejudice to the

applicant as one criteria in determining timeliness. However, contrary to Makah's claim that a conflict exists among the circuits, that factor has never been established as mandatory among those circuits that include it in their test, thus leaving the key factors for resolving timeliness consistent throughout the circuits and consistent with the directives from this Court.

From the very outset, prejudice to the applicant has not been considered an essential part of the timeliness test. In the case that apparently first included "prejudice to the applicant" as a criteria in its list of factors, that very factor was *ignored* by the court in its analysis. In *Stallworth v. Monsanto Co., supra,* the Fifth Circuit listed "four factors that must be considered in passing on the timeliness of a petition for leave to intervene." 558 F.2d at 264. As noted above these were: (1) the length of time the applicant knew or should have know of his interest in the case before petitioning for intervention; (2) the prejudice to existing parties; (3) the prejudice to the applicant; and (4) any unusual circumstances militating either for or against a determination of timeliness.

After applying factors 1, 2 and 4 to the record before it, the *Stallworth* court concluded, "In view of the circumstance that Factors 1, 2, and 4 militate strongly in favor of a finding of timeliness, *it is not necessary for us to consider in this context the extent to which the appellants might be prejudiced if their motion were denied." Id.* at 267 (emphasis added).[1]

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[1] The *Stallworth* decision states that all four factors "must" be considered in passing on timeliness. Apparently only one

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This pattern of considering two or three factors and disregarding that of prejudice to the applicant is uniformly followed in subsequent cases including, significantly, cases from those circuits that Makah claims include it as part of the test for timeliness. *Kneeland v. National Collegiate Athletic Ass'n.*, 806 F.2d 1285 (5th Cir. 1987); *United States v. LeFevor*, 798 F.2d 977 (7th Cir. 1986); *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); *United States v. City of Chicago*, 796 F.2d 205 (7th Cir. 1986); *Corely v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

The disregard of this factor might be attributed to the failure of the parties to raise the issue before the trial court. *See, for example, Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5 (1st Cir. 1989). However, that is rarely the case. It is clear, even in cases where prejudice to the applicant is claimed and argued, that other factors in the timeliness test are given more weight. *Serra v. United States General Services Administration*, 847 F.2d 1038, 1044-45 (2d Cir. 1988); *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983). In *Corely v. Jackson Police Department, supra*, after restating and applying parts 1, 2 and 4 of the test set out in its earlier decision in *Stallworth*, the Fifth Circuit stated that, "In light of the

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circuit court has ever taken that language literally and remanded a case on the grounds that the district court failed to consider the factor of prejudice to the applicant for intervention in its analysis of timeliness. *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365-66 (11th Cir. 1984).

foregoing, *Stallworth*'s third factor, involving prejudice to the intervenor, could not bring sufficient weight to bear to offset the other factors and carry the timeliness issue for the appellant." 755 F.2d at 1210.

The Second Circuit in *United States v. Yonkers Board of Education*, 801 F.2d 593 (2d Cir. 1986), stated that in weighing the harm to late intervenors against harm to existing parties, " . . . it does not strike us as unjust that intervention on the part of late-arrivers must yield to all the circumstances herein." *Id.* at 596. *See also, Serra v. United States General Services Administration, supra,* at 1044-45. This is consistent with the established rule that the single most important consideration in determining the timeliness of intervention is the prejudice to the existing parties to the case. 7C Wright, Miller, Kane, *Federal Practice and Procedure*, Section 1916, p. 435 (1986); *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978); *Davis v. Board of School Commissioners of Mobile Co.*, 517 F.2d 1044 (5th Cir. 1975).

Since it was first established as a factor in the timeliness test, there have been relatively few courts that have expressly evaluated the prejudice to applicant factor. Those that have done so either criticize it or define its role in very limited terms.

Judge Aldrich of the First Circuit, in a concurring opinion in *Culbreath v. Dukakis, supra,* directed his attention to it. In voicing his disagreement with its inclusion as a factor in evaluating timeliness, he stated:

> Without discussing it in detail, I think there is over-concern with the question of possible harm to appellants. Passing the question of how we are able to determine the merits of applicants' case when they have not been allowed to

> present it, I do not believe we should have to do so. There should be two principal issues – was there a substantial, unexcused delay after appellants knew, or should have known, of an interest and right to seek to intervene, and are the parties seriously prejudiced by the delay, viz., to what extent would they be worse off by intervention when sought, as distinguished from when it reasonably could have been sought? If the unexcused delay would cause substantial prejudice to the parties, appellants should bear the loss, as any other defaulting party. I would view prejudice to them only as part of a claim of unusual circumstances, *NAACP v. New York*, 1973, 413 U.S. 345, 368, 93 S.Ct. 2591, 37 L.Ed.2d 648 – not here possible – and not something to be considered in the ordinary course.

630 F.2d at 25.

In *United States v. Jefferson County, supra,* the Eleventh Circuit considered the prejudice to the applicant factor as announced by the Fifth Circuit in *Stallworth v. Monsanto Co., supra,* and concluded that it had relevance in only two situations:

> We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party and that the party's representation may be inadequate to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.

720 F.2d at 1517.

Among the circuits that have adopted the test first defined by the Fifth Circuit in *Stallworth*, there is consensus with regard to the prejudice to applicants factor that *"Stallworth* is not an algorithm, but a framework for analysis." *Lelsz v. Kavanaugh*, 710 F.2d 1040, 1043 (5th Cir. 1983); *Corely v. Jackson Police Department*, 755 F.2d at 1209.

d. Conclusion.

It is significant that none of the major authorities on federal practice and procedure note the conflict among circuits claimed by Makah. Makah's entire argument hinges upon the assertion that in the First, Second, Fifth, Seventh, Eleventh and D.C. Circuits, the factor of prejudice to applicants for intervention is a *mandatory* consideration in the analysis of timeliness. However, that is clearly not the case. Even in the circuits where it is considered, the prejudice to applicants factor is relegated to a relatively minor role. Rather, the circuits are consistent in giving primary consideration to the prejudice intervention would have upon the existing parties and the duration and reason for the delay in intervention with due consideration given to "all circumstances" as directed by this Court in *NAACP*. Accordingly, review should be denied on the issue of the Ninth Circuit's failure to consider prejudice to Makah in analyzing the timeliness of Makah's application for intervention.

II. Review Should be Denied Because the Ninth Circuit Properly Analyzed the Role of Prejudice to Existing Parties in Determining the Timeliness of Makah's Application for Intervention.

Consideration of prejudice to existing parties is a well-established part of the Ninth Circuit's timeliness

analysis. *Alaniz v. Tillie Lewis Foods, supra* at 659; *Petrol Stops Northwest v. Continental Oil Company*, 647 F.2d 1005, 1009-1010 (9th Cir. 1981); *Shelter Framing Corp. v. Pension Benefit Guarantee Corporation*, 705 F.2d 1502, 1508 (9th Cir. 1983); *Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 530 (9th Cir. 1984); *United States v. Oregon*, 745 F.2d 550, 552-553 (9th Cir. 1984).

The Ninth Circuit's analysis of prejudice to existing parties is not in conflict with other circuits. *See, Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976); *McClain v. Wagner Electric Co-op*, 550 F.2d 1115, 1120 (8th Cir. 1977).

The Ninth Circuit opinion in this case acknowledged that prejudice to existing parties is an important part of the timeliness analysis. "One of the 'most important' factors in determining timeliness is prejudice to the existing parties. *United States v. Oregon*, 745 F.2d at 552." *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990) (citing an earlier Ninth Circuit decision in this case concerning Idaho's intervention).

The only basis Makah has for seeking certiorari on this issue is its claim that the Ninth Circuit opinion, after correctly stating the law with respect to prejudice to existing parties, failed to thoroughly analyze and discuss the issue. In short, Makah's sole complaint is one of insufficient emphasis rather than legal error. Review should be granted, according to Makah, because the Ninth Circuit "gave only *cursory treatment* to the issue of prejudice to the existing parties." Petitioner's Br. at 42 (emphasis added).[2]

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[2] Makah's criticism of the Ninth Circuit's depth of analysis on the prejudice issue is especially unwarranted in light of the

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Besides falling far short of the standards for Supreme Court review, Makah's criticism of the Ninth Circuit opinion is misplaced. Not only did the Ninth Circuit correctly state the law on this issue, it also properly applied it to the facts of this case. The prejudice to existing parties in this case stems from the fact the Makah intervention would lead to proposed modifications to the existing parties' Columbia River Fish Management Plan (Plan), and perhaps lead to the destruction of the Plan.

It is clear from Makah's Petition for Writ of Certiorari, just as it was clear to the district court and the Ninth Circuit, that Makah is interested in more than becoming a party to the *case*. What Makah really wants is to become a party to the *Plan*. Makah assumes that if it becomes a party to the case, it will become a party to the Plan. "Makah's participation in future, annual negotiations to *implement the plan* cannot now jeopardize the existence of the plan itself." Petitioner's Br. at 48 (emphasis added). Makah's intent is also shown by its assertion that there would be no prejudice to other parties "from permitting Makah to participate in *future proceedings under the plan* negotiated by the existing parties and approved by the court." Petitioner's Br. at 47-48 (emphasis partly added and partly in original). *See also*, Makah's Complaint in Intervention. Petitioner's Br. at 18 n.15.

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abuse of discretion standard of appellate review applicable to the issue.

In fact, Makah's intervention in the case would not automatically make it a party to the Plan. Moreover, only parties to the Plan can participate in negotiations and processes under the Plan.[3] After intervention, Makah would stand in the position of being a party to the case yet outside the Plan and its processes. Of course, once it is a party to the case, Makah would then seek to modify the Plan to become a full participant. Assuming Makah is successful, that action alone would change the Plan by widening its geographic scope.[4] Makah might also seek changes in the Plan to accommodate its interests and preferences for how the Plan should work. These proposed changes presumably would reflect the objections to the Plan that Makah raised in the Plan-approval proceeding in the district court. *See, United States v. Oregon*, 699 F. Supp. 1456, 1468-69 (D. Or. 1988) (Amended Opinion re: Plan); *United States v. Oregon*, 122 F.R.D. 571 (D. Or. 1988) (Amended Opinion re: Intervention).

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[3] Although Idaho and the Shoshone-Bannock Tribes did not sign the Plan, Idaho "is considered a party by [the Plan's] terms," *United States v. Oregon*, 699 F. Supp. 1456, 1460 (D. Or. 1988), and the Shoshone-Bannock Tribes were made a party by amendments to the Plan ordered by the district court. *Id.* at 1465. The Colville Tribes became a party to the case after the Plan was approved for the sole purpose of determining whether some or all of Colville's tribal members have treaty fishing rights under the Yakima and Nez Perce treaties. Colville is not a party to the Plan.

[4] The Plan does not apply to "entities not party to this agreement." Plan, Section I.B.3 (CR 1490, Ex. A). As a party to the agreement, Makah and its ocean fisheries off the northwest corner of Washington's Olympic Peninsula would be subject to the Plan's provisions concerning harvest management and other matters.

It was Makah's professed desire to become a party to the *Plan* and to participate in future negotiations and proceedings under the *Plan*, that the district court and the Ninth Circuit found prejudicial to the existing parties in terms of Makah's admission to the case on an ongoing basis. *United States v. Oregon*, 122 F.R.D. at 575, 578, 579; *United States v. Oregon*, 913 F.2d at 588, 589. The district court felt, and the Ninth Circuit agreed, that adding a new party into the "complex and delicately balanced" Plan after four and a half years of negotiations, when the new party represented new geographical, biological and legal interests, with the expectation that the new party would demand that the Plan be adjusted to accommodate its interests, might very well upset the balance of concessions contained in the consent decree and perhaps destroy it.[5] As the district court explained:

> Each portion of the complex Plan reflects concessions made and relates to other portions of the Plan. To allow participation by the Makah Tribe [in the Plan] now would require the parties to start negotiating all over again. I find this would significantly prejudice the existing parties.

122 F.R.D. at 575. Later, in the portion of its opinion discussing permissive intervention, the district court further explained how Makah's intervention in the case would trigger a potentially fruitless attempt to renegotiate the Plan:

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[5] The Plan is self-terminating under several conditions, one of which is the withdrawal of a party or parties at any time for any reason after June 30, 1991. Plan, Section I.F.3 (CR 1490, Ex. A).

> . . . I note that the delay that might occur is not a delay in objecting and hearing objections to the 1988 Plan, but rather the delay would be in trying to reopen negotiations of the Plan. The Plan is a complex, sensitively balanced document that was derived following more than four years of negotiation. To renegotiate and allow the Makah Tribe complete participation would be a serious prejudice to the participating parties. Further, the Makah Tribe has not demonstrated anything to indicate such a renegotiation would be fruitful. Thus, I find to grant status as a permissive intervenor to the Makah Tribe would unduly delay the proffered implementation of the 1988 Plan and would prejudice the adjudication of the rights of the original parties.

122 F.R.D. at 579.

That is why the district court and the Ninth Circuit cited *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), for the proposition that intervention that might cause the unraveling of a settlement agreement is "so prejudicial that to allow [intervention] at this late date would be tantamount to disaster." 913 F.2d at 589.

Although Makah's Petition ignores the difference between intervention in the *case* and becoming a party to the *Plan*, the district court and the Ninth Circuit did not. What the district court and the Ninth Circuit feared is that intervention in the case would lead to Makah demands for modifications in the Plan to accommodate Makah's asserted interests. The district court clearly had doubts whether the Plan could survive as a consent decree negotiated by the existing parties if Makah attempted to become a party to the Plan and assert its interests in future negotiations and proceedings under

the Plan. The Ninth Circuit adequately reviewed this aspect of the district court's ruling and correctly found no abuse of discretion. Accordingly, there is no basis for granting certiorari on the issue of the Ninth Circuit's analysis of prejudice to existing parties in determining the timeliness of Makah's application for intervention.

III. Review Should be Denied Because the Ninth Circuit's Decision in this Case is Not in Conflict with this Court's Decision in *Martin v. Wilks*.

The Ninth Circuit's decision in this case is not in conflict with this Court's decision in *Martin v Wilks*, 490 U.S. 755 (1989). This Court's decision in *Wilks* allowed plaintiffs to intervene despite previous litigation deciding the same issue because plaintiffs' rights were directly affected by that litigation and they had no other means of protecting their rights. These factors are not present in this case. Here, the interest that the Makah seeks to protect is indirect, and Makah has access to other forums in which that interest is directly protected.

In *Wilks*, an employer who had entered into a consent decree in a prior lawsuit which required the establishment of goals for promoting black employees was sued by another group of employees who claimed that the employer's reliance upon the terms of the consent decree in promoting black employees violated their rights to be protected against racial discrimination. The *Wilks* defendants, including several black employees who were parties to the previous action, sought to have the plaintiffs' case dismissed on the grounds that plaintiffs could have

intervened in the previous case but failed to do so. Therefore, defendants argued that plaintiffs were precluded from collaterally challenging the consent decree in this action under the "impermissible collateral attack" doctrine.

This Court rejected the defendants' argument that the impermissible collateral attack doctrine precluded plaintiffs' challenge to the employer's actions. This Court noted that, generally, a person's legal rights cannot be deprived in a proceeding to which a person is not a party. 490 U.S. at 763. This Court also noted that the Federal Rules of Civil Procedure (Rule 19 and Rule 24) generally provide for joinder and voluntary intervention and that the parties seeking a judgment binding on another must join that person but that person is not obligated to intervene. Based upon these general principles of jurisprudence, this Court went on to hold that the plaintiffs in *Wilks* could not be precluded from challenging in a separate proceeding the employer's actions under the consent decree that were alleged to constitute impermissible racial discrimination in violation of the federal constitution and statutes. 490 U.S. at 764.

Makah argues that the Ninth Circuit decision in this case is in conflict with this Court's decision in *Wilks*. Makah asserts that the Ninth Circuit's decision denying intervention as untimely "sacrificed Makah's ability, as a practical matter, to protect its fishing rights" in violation of the *Wilks* principle that a party's right to have "his own day in court" cannot be denied by a failure to intervene. Petitioner's Br. at 55. This contention is simply not true.

First, Makah's interest in the in-river allocation process, unlike that of the *Wilks* plaintiffs, is an indirect interest because its ocean fishery is not directly affected by the Plan. *United States v. Oregon*, 122 F.R.D. at 576-577. Second, there are judicial and administrative forums in which Makah, like every other party with an interest in the ocean fishery, can participate in order to protect its interests. *Id.* at 577; *United States v. Oregon*, 913 F.2d at 587. In contrast, the plaintiffs in *Wilks* had no other judicial forum in which to protect their interests.

This case involves a complex judicial and administrative scheme to regulate the harvest of Columbia River salmon and steelhead. *See*, 913 F.2d at 579. The harvest management and other provisions of the Plan do not directly affect the Makah's treaty fishing rights in the Pacific Ocean. Indeed, the Plan expressly disclaims any application to non-parties to the agreement. Plan, Section I.B.3 (CR 1490, Ex. A). Makah's interest in the processes and operation of the Plan is an indirect interest. *See*, 122 F.R.D. at 577. The Plan does not – nor was it intended to have – a binding effect on the Makah's interests in protection of its ocean treaty fishery. Although the Plan properly recognizes that ocean fishery management has an impact on the treaty fishing rights of the Columbia River tribes because fish caught in the ocean count for allocation purposes[6], and therefore there is a need for coordination between the in-river and ocean management agencies, the Plan does not precommit the Secretary of

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[6] The Columbia River tribes believe that the Plan requires the counting of only the non-Indian ocean catch. The state and federal parties to the Plan disagree.

Commerce to adopt specific ocean harvest quotas and does not limit the Secretary's regulatory authority over ocean fisheries. Ocean fishery management is constrained by federal law, treaty rights (both Makah's and those of the Columbia River tribes) and conservation necessity. The directly affected legal interest that was protected in the *Wilks* litigation is simply not present here.

Moreover, ocean fisheries off the coast of Oregon and Washington, including Makah's ocean fishery, are regulated by the federal government under the Fishery Conservation and Management Act of 1976 (FCMA), Pub.L. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §1801 *et seq.*).[7] There are other forums, both judicial[8] and administrative,

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[7] The FCMA establishes an administrative process in which parties with interests in Pacific salmon fisheries within the United States' jurisdiction can participate in the management of the fisheries. The FCMA establishes the Pacific Fishery Management Council (PFMC), which is composed of representatives of the States of Washington, Oregon, California, and Idaho, one representative of the Indian tribes and the federal government. 16 U.S.C. §1852(a)(6). The PFMC develops a regional fishery management plan which must be consistent with applicable law, including Indian treaty rights, and must consider the regulations of coastal states. 16 U.S.C. §1853 (a)(1)(C); 50 C.F.R. §602.11(f)(3)(ii). After public meetings, the PFMC recommends yearly harvest rates to the Secretary of Commerce, who promulgates regulations detailing ocean fishing allotments. 16 U.S.C. §1854. The Secretary's regulations are subject to judicial review under the Administrative Procedures Act. 16 U.S.C. §1855(d); 5 U.S.C. §706(2).

[8] Makah's fisheries are also regulated by the State of Washington under on-going federal court supervision. *See, U.S.*

(Continued on following page)

in which Makah can and does participate to protect its interest in its ocean treaty fishery. Thus, unlike the situation facing the *Wilks* plaintiffs, the denial of Makah's intervention does not preclude Makah from protecting its ocean treaty fishing rights.

Unlike the potential preclusive effect of the consent decree on the plaintiffs in *Wilks*, the existing parties' Columbia River Fish Management Plan does not have a preclusive effect on Makah's ability to protect its interest in its ocean treaty fishery. The Ninth Circuit's holding therefore is not inconsistent with *Wilks*.

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v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976) (the forum for allocating fishing rights within the jurisdiction of the state of Washington, extending three miles out to sea, and which involves the Puget Sound and Washington Coastal treaty tribes, including Makah).

CONCLUSION

For the reasons stated above, Makah's Petition for Writ of Certiorari should be denied.

DATED this 6th day of June, 1991.

Respectfully submitted,

DOUGLAS NASH

Counsel of Record for Respondent Nez Perce Tribe

HOWARD G. ARNETT

Counsel of Record for Respondent Confederated Tribes of the Warm Springs Reservation of Oregon

TIM WEAVER

Counsel of Record for Respondent Confederated Tribes and Bands of the Yakima Indian Nation

CRAIG DORSAY

Counsel of Record for Respondent Confederated Tribes of the Umatilla Indian Reservation